

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DARRELL B. EASON,)	
)	
Petitioner,)	CASE NO. C06-322-JCC-JPD
)	
v.)	
)	
EVERETT MUNICIPAL COURT,)	REPORT & RECOMMENDATION
)	
Respondent)	
_____)		

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Darrell Eason has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in which he seeks to challenge his January 2003 Everett Municipal Court conviction on a charge of assault in the fourth degree, domestic violence. Respondent has filed an answer to the petition together with relevant portions of the state court record. Petitioner has filed a response to respondent's answer, respondent has filed a reply brief in support of its answer, and petitioner has filed an "answer" to respondent's reply. In addition, petitioner has filed a renewed motion for a protective order in which he requests an order directing respondent to stay execution of his sentence pending resolution of the instant federal habeas petition. The Court, having reviewed the entirety of

1 the record, concludes that petitioner's § 2254 petition and his renewed motion for a protective order
2 should be denied, and that this action should be dismissed with prejudice.

3 FACTUAL AND PROCEDURAL HISTORY

4 The Washington Court of Appeals summarized the facts relevant to petitioner's Everett
5 Municipal Court conviction, and to his subsequent RALJ appeal to the Snohomish County Superior
6 Court, as follows:

8 Mr. Eason was charged with assaulting his estranged wife, Linda Browning-
9 Eason, in her home on October 21, 2003. During trial the City presented the
10 testimony of two police officers, Eason's stepdaughter, Julie Rohner, and Linda. The
11 City presented evidence that Eason entered the home, demanded to know who was
12 there, grabbed Linda by the neck and arm, and pulled her outside, where he pushed her
up against a wall. Eason's version is that he walked calmly into the house, asked to
speak to Linda, and they went outside to talk. On January 12, 2004, the jury
convicted Eason as charged.

13 Eason appealed to the superior court, where he argued that minorities were
14 systematically excluded from juries in Snohomish County, the City failed to prove
15 intent, the jury was not adequately instructed on intent, and Eason's counsel was
16 ineffective in failing to adequately cross examine Linda and failing to question
prospective jurors about their attitudes of interracial marriage.

17 The superior court found: the record lacked any factual basis to find that
18 minorities were systematically excluded from the jury; both counsel questioned jurors
19 before the jury panel was selected; the City presented testimony from two civilian
20 witnesses and two police officers; defense counsel cross examined the City's
21 witnesses; defense counsel presented Eason's testimony; and the jury was instructed
22 on the elements of fourth degree assault and intent using Washington pattern
instructions. Based on these findings, the court concluded: the method of jury
selection did not constitute purposeful discrimination; jurors were properly instructed
on the elements of the offense, the City presented sufficient evidence to support the
conviction; and Eason received effective representation characterized as reasonable or
legitimate trial strategy. The court affirmed the conviction.

23 (Dkt. No. 24, Commissioner's Ruling Denying Discretionary Review at 1-2.)
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25 Following the issuance of the Snohomish County Superior Court's decision on petitioner's
26 RALJ appeal, petitioner sought discretionary review in the Washington Court of Appeals. (*See id.*)

1 On March 7, 2005, the Court Commissioner for the Court of Appeals denied discretionary review.
2 (*Id.*) Petitioner thereafter filed a motion to modify the Commissioner's ruling. (*Id.*, Motion to
3 Modify Ruling.) Petitioner's motion to modify was denied on May 13, 2005. (Dkt. No. 24, Order
4 Denying Motion to Modify.)
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6 Petitioner next filed a motion for discretionary review in the Washington Supreme Court.
7 (*Id.*, Motion for Discretionary Review.) On July 14, 2005, the Supreme Court Commissioner denied
8 review. (*Id.*, Ruling Denying Review.) The Court of Appeals issued a certificate of finality in
9 petitioner's state court proceedings on April 21, 2006. (*Id.*, Certificate of Finality.) Petitioner's case
10 was thereafter remanded to the Everett Municipal Court for reimposition of the sentence originally
11 imposed by the court on January 12, 2004, immediately following petitioner's conviction. (*See* Dkt.
12 No. 29, Ex. A at 2 and 4.) On September 27, 2006, sentence was reimposed by the Everett
13 Municipal Court. (*Id.* at 6.)
14

15 GROUND FOR RELIEF

16 Petitioner presents six grounds for relief in his federal habeas petition. Petitioner asserts in his
17 first ground for relief that he was denied effective assistance of counsel in violation of his rights under
18 the Sixth and Fourteenth Amendments. Petitioner asserts in his remaining five grounds for relief that
19 his Fourteenth Amendment rights were violated when: (a) the prosecution failed to prove the element
20 of intent (Ground Two); (b) there was no jury instruction on intent (Ground Three), (c) minorities
21 were systematically excluded from the jury (Ground Four), (d) there was insufficient evidence to
22 support the charge (Ground Five); and, (e) the trial court failed to ensure that petitioner received a
23 fair trial (Ground Six).
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DISCUSSION

Respondent first argues that petitioner is not in custody for purposes of § 2254. Respondent also argues that, even if petitioner is deemed to be in custody for purposes of federal habeas review, petitioner has not asserted any valid basis on which federal habeas relief is available or should be granted. This Court rejects respondent's contention that petitioner is not in custody for purposes of federal habeas review, but agrees that petitioner has not identified any grounds upon which he is entitled to federal habeas relief.

Custody

Petitioner was not in actual physical custody at the time he filed his federal habeas petition. However, the United States Supreme Court has made clear that “the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody.” *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) (citing *Jones v. Cunningham*, 371 U.S. 236 (1963)). In *Hensley v. Municipal Court*, 411 U.S. 345 (1973), the Supreme Court held that a federal habeas petitioner who had been convicted, but released on his own recognizance pending execution of his sentence, was in custody for purposes of federal habeas review. *Id.* at 351-352.

Respondent has provided the Court with a copy of the docket of petitioner’s Everett Municipal Court criminal proceedings. (*See* Dkt. No. 29, Ex. A.) The docket reflects that petitioner was convicted and sentenced on January 12, 2004. (*Id.* at 2.) The docket further reflects that at least some aspects of petitioner’s sentence were stayed pending appeal. (*Id.* at 4.) After petitioner’s conviction was affirmed by the state courts, the matter was remanded for “reimposition” of sentence. (*Id.*) It is not entirely clear why sentence would need to be “reimposed” given that plaintiff was awarded no relief in his state post-conviction proceedings. Nonetheless, it is clear that plaintiff

1 remained under the authority of the Everett Municipal Court from the time of his conviction in
2 January 2004, until the time sentence was “reimposed” on September 27, 2006. *See* RALJ 4.3(b).
3 Petitioner filed the instant habeas petition in March 2006. On these facts, this Court concludes, under
4 *Hensley*, that petitioner was in custody for purposes of federal habeas review at the time he filed his
5 federal habeas petition.
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7 Standard of Review

8 Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be
9 granted with respect to any claim adjudicated on the merits in state court only if the state court’s
10 decision was *contrary to*, or involved an *unreasonable application* of, clearly established federal
11 law, as determined by the Supreme Court, or if the decision was based on an unreasonable
12 determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added).
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15 Under the “contrary to” clause, a federal habeas court may grant the writ only if the state
16 court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or
17 if the state court decides a case differently than the Supreme Court has on a set of materially
18 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the “unreasonable
19 application” clause, a federal habeas court may grant the writ only if the state court identifies the
20 correct governing legal principle from the Supreme Court’s decisions, but unreasonably applies that
21 principle to the facts of the prisoner’s case. *Id.* The Supreme Court recently made clear that a state
22 court’s decision may be overturned only if the application is “objectively unreasonable.” *Lockyer v.*
23 *Andrade*, 538 U.S. 63, 69 (2003).
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25 Ground One: Ineffective Assistance of Counsel

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1 Petitioner asserts in his first ground for relief that he was denied the effective assistance of
2 counsel when his trial counsel: (1) failed to conduct a pretrial interview with the complaining witness;
3 (2) failed to challenge the arresting officers' testimony regarding bruising and fingerprint marks; (3)
4 failed to voir dire the jury concerning racial bias; (4) failed to argue that prosecution never proved
5 intent; (5) failed to request instruction on intent; (6) failed to argue that petitioner had no prior
6 arrests; and, (7) failed to request that a domestic violent profile be completed for petitioner.

8 The Snohomish County Superior, on petitioner's RALJ appeal, concluded that petitioner
9 "received effective representation that can be characterized as reasonable or legitimate trial strategy."
10 (Dkt. No. 24, Findings of Fact, Conclusions of Law & Order on Remand at 2.) In order to be entitled
11 to federal habeas relief with respect to his claims of ineffective assistance of counsel, petitioner must
12 demonstrate that this decision of the Superior Court was contrary to, or constituted an unreasonable
13 application of, federal law as established by the United States Supreme Court. This petitioner has not
14 done.

16 The Sixth Amendment guarantees a criminal defendant the right to effective assistance of
17 counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective assistance of
18 counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*, a defendant
19 must prove (1) that counsel's performance fell below an objective standard of reasonableness and,
20 (2) that a reasonable probability exists that, but for counsel's error, the result of the proceedings
21 would have been different. *Strickland*, 466 U.S. at 687.

23 When considering the first prong of the *Strickland* test, judicial scrutiny must be highly
24 deferential. *Id.* at 689. There is a strong presumption that counsel's performance fell within the
25 wide range of reasonably effective assistance. *Id.* The second prong of the *Strickland* test requires a
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1 showing of actual prejudice related to counsel's performance. The petitioner must demonstrate that
2 it is reasonably probable that, but for counsel's errors, the result of the proceedings would have been
3 different. The reviewing Court need not address both components of the inquiry if an insufficient
4 showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both components
5 are to be considered, there is no prescribed order in which to address them. *Id.*

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7 ***1. Failure to Conduct Pretrial Interview***

8 Petitioner asserts that his trial counsel rendered ineffective assistance when he failed to
9 conduct a pretrial interview of the complaining witness. Petitioner appears to be of the belief that if
10 counsel had conducted a pretrial interview, he would have learned from the complaining witness,
11 petitioner's estranged wife Linda, that no assault had occurred. Petitioner fails, however, to point to
12 any information which Linda may have been able to provide counsel which would have exonerated
13 petitioner.
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15 Petitioner makes reference in his petition to pretrial statements made by Linda which
16 petitioner interprets as establishing that there was no assault. However, the statements petitioner
17 appears to be referencing do not, in fact, establish that there was no assault. Prior to trial, petitioner
18 was informed by one of the arresting officers that Linda had told the officer she never wanted
19 petitioner's arrest and that the matter had "gotten out of hand." (*See* Dkt. No. 24, Pro Se Brief of
20 Appellant at 2-3.) These statements are not inconsistent with, nor do they undermine, Linda's trial
21 testimony which established that the touching was intentional and offensive. Thus, to the extent
22 petitioner believes that counsel erred when he failed to discover, or make use of, such statements,
23 petitioner's ineffective assistance of counsel claim must fail as petitioner has established no prejudice
24 resulting from the alleged error. To the extent petitioner believed that counsel erred when he failed to
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1 discover other evidence which might have exonerated petitioner, petitioner simply fails to
2 demonstrate that any such evidence existed. This portion of petitioner's ineffective assistance of
3 counsel claim must therefore fail.

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5 **2. Failure to Challenge Testimony Re: Physical Evidence of Assault**

6 Petitioner asserts that his counsel rendered ineffective assistance when he failed to challenge
7 the testimony of arresting officers concerning bruising and fingerprint marks. Two City of Everett
8 police officers testified at petitioner's trial, Officer Randall Marrs and Officer Kevin Fifield. Officer
9 Marrs, the primary officer to respond to the 911 call at the victim's residence, testified that he
10 observed "pressure marks" on the victim's neck and arm and that the marks appeared to be recent.
11 (Dkt. No. 39 at 62-64.) Officer Marrs further testified that the marks were consistent with the
12 victim's explanation of what had occurred and also with the description of events provided by the
13 victims's daughter who had witnessed the incident. (*Id.* at 65-66.) Petitioner's counsel cross-
14 examined Officer Marrs, but did not question him about any pressure marks or bruises.
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16 Officer Fifield testified that he responded briefly to the victim's residence as the back-up
17 officer, but did not interview any witnesses. (*Id.* at 77.) Officer Fifield further testified that he did
18 not actually observe any injuries on the victim because he was not there long enough, but that he
19 became aware of the bruising as a result of information he obtained from Officer Marrs. (*Id.*)
20 Petitioner's counsel, on cross-examination, questioned Officer Fifield regarding any training he had
21 received regarding bruising. (*Id.* at 80.) The prosecutor objected to the inquiry regarding bruising on
22 the grounds that Officer Fifield had not observed any bruising. (*Id.* at 80-81.) The court sustained
23 the objection and noted that counsel could have asked Officer Marrs that question. (*Id.* at 81)
24 Counsel never made any move to recall Officer Marrs.
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1 The record suggests that petitioner's counsel felt the bruising was an area worth exploring and
2 that he erroneously sought to question the wrong witness with regards to this topic. However, even
3 assuming counsel's performance can be deemed deficient based on his failure to pursue the topic of
4 bruising with the proper witness, petitioner fails to demonstrate any prejudice with respect to this
5 conduct. Officer Marrs' testimony that he saw marks on the victim was consistent with the testimony
6 of both the victim and the victim's daughter. Moreover, petitioner admitted in his own testimony that
7 he had grabbed the victim and that it was possible there could be bruising as a result of this because
8 the victim was fair skinned. (*See* Dkt. No. 39 at 98-99.) When viewing the record as a whole, this
9 Court must conclude that the alleged deficient conduct of counsel with respect to the issue of bruising
10 did not prejudice petitioner and, thus, this portion of petitioner's ineffective assistance of counsel
11 claim must fail.
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14 **3. Failure to Voir Dire re: Racial Bias**

15 Petitioner next asserts that his trial counsel rendered ineffective assistance when he failed to
16 voir dire the jury on the issue of racial bias given that petitioner is black and the victim is white. In
17 *Turner v. Murray*, 476 U.S. 28 (1986), the Supreme Court held that a defendant who is accused of an
18 interracial capital crime is entitled to have prospective jurors questioned on the issue of racial bias.
19 *Id.* at 36-37. The Supreme Court also stated, however, that a defendant cannot complain of the
20 failure to question prospective jurors on the issue of racial prejudice unless the defendant has
21 specifically requested such an inquiry. *Id.* at 37. The Supreme Court made clear that the decision of
22 whether to question prospective jurors on the issue of racial bias is a decision for defense counsel.
23 *See id.* n. 10.
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1 Petitioner contends that there was no justifiable reason for counsel's failure to conduct an
2 inquiry into racial bias during voir dire given that this was a racially charged trial involving an
3 interracial marriage. Nothing in the record before this Court reveals whether counsel's failure to
4 conduct such an inquiry was trial strategy as opposed to an oversight or mere indifference. However,
5 as noted above, there is a strong presumption that counsel's performance fell within the wide range of
6 range of reasonably effective assistance. *Strickland*, 466 U.S. at 689. Petitioner fails to overcome
7 this presumption. Petitioner also fails to demonstrate that he was prejudiced by counsel's failure to
8 inquire into jurors' attitudes regarding interracial marriage or to otherwise probe regarding issues of
9 racial bias. Accordingly, petitioner cannot prevail on this claim.
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11 **4. *Failure to Request Jury Instruction re: Intent***
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13 Petitioner next asserts that counsel rendered ineffective assistance when he failed to request a
14 jury instruction regarding intent. On appeal, the Snohomish County Superior Court concluded that
15 the jurors were properly instructed on the elements of the crime of assault in the fourth degree and on
16 the legal definition of intent. Petitioner appears to be of the belief that he was entitled to some
17 additional instruction with respect to intent other than the one provided for in the Washington pattern
18 instructions. Specifically, petitioner contends that he "was entitled to have the jury consider whether
19 he reasonably expected that his physical contact with his wife was consensual." (Dkt. No. 31 at 7.)
20 However, petitioner offers no authority to support his assertion that he was entitled to any additional
21 instruction. As it appears that the jury was properly instructed in accordance with state law,
22 counsel's failure to request an additional instruction does not amount to deficient performance.
23 Accordingly, this portion of petitioner's ineffective assistance of counsel claim must also fail.
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1 **5. *Failure to Argue Intent***

2 Petitioner next asserts that counsel rendered ineffective assistance when he failed to argue that
3 the government never proved intent. Petitioner is correct that counsel did not argue in closing
4 statements that the government failed to prove intent. However, the record indicates that there was
5 no basis for counsel to make any such argument. Petitioner admitted during his own testimony that
6 he grabbed the victim. (Dkt. No. 39 at 98-99.) Petitioner described his actions as an attempt to give
7 the victim a hug. (*Id.*) Regardless of how petitioner characterized the touch, petitioner made clear
8 through his own testimony that he intended to touch the victim. Any argument to the contrary would
9 have been unavailing and, thus, this portion of petitioner's ineffective assistance of counsel claim must
10 fail.
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12 **6. *Failure to Argue Absence of Prior Arrests***

13 Petitioner asserts that his counsel rendered ineffective assistance when he failed to argue to
14 the jury that petitioner had no prior arrests. However, petitioner fails to make clear how the absence
15 of a prior arrest record would have been relevant or beneficial to his defense. Accordingly, this
16 portion of his ineffective assistance of counsel claim must fail.
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18 **7. *Failure to Request Domestic Violence Assessment***

19 Petitioner asserts in his final ineffective assistance of counsel claim that counsel rendered
20 ineffective assistance when he failed to request a domestic violence assessment for petitioner.
21 However, petitioner once again fails to make clear how this alleged deficient conduct prejudiced him.
22 Accordingly, this final portion of petitioner's ineffective assistance of counsel claim must also fail.
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Petitioner's second and fifth ground for federal habeas relief both appear to challenge the sufficiency of the evidence presented by the prosecution to support petitioner's conviction on a charge of fourth degree assault. In his second ground for relief, petitioner asserts that the government failed to prove the element of intent. (Dkt. No. 1 at 8.) In his fifth ground for relief, petitioner asserts that "[a] man placing his hand upon his wife's shoulders does not constitute domestic violence." (*Id.* at 13.) On appeal, the Snohomish County Superior Court found that the prosecution had presented sufficient evidence to support a finding of guilty on the charge of Assault 4th Domestic Violence. (Dkt. No. 24, Findings of Fact, Conclusions of Law & Order on Remand at 2.)

[A] federal habeas court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution and must defer to that resolution.

At trial, the prosecution presented evidence that petitioner appeared at his estranged wife's home unannounced, that he became involved in a heated argument with his estranged wife, that he grabbed his estranged wife and, in doing so, left pressure marks or bruises on her arm and neck.

1 Petitioner himself admitted at trial that he grabbed his estranged wife and that he intended to do so.
2 Petitioner described the contact as an attempt to put his arms around her and hug her while the victim
3 and the victims daughter described the contact as petitioner grabbing the victim's arm.

4 While petitioner asserts that he had no intent to injure or assault the victim, the jury was
5 entitled to conclude from the testimony that the touching was intentional and that it was offensive. It
6 appears clear that the jury resolved conflicting inferences in favor of the prosecution. This Court
7 must defer to the that resolution. Accordingly, petitioner's federal habeas petition should be denied
8 with respect to his fifth ground for relief.

10 Ground Three: Jury Instructions

11 Petitioner asserts in his third ground for federal habeas relief that the jury was not instructed
12 that they must find the element of intent. On appeal, the Snohomish County Superior Court
13 concluded that petitioner was properly instructed on the elements of the charged offense and on the
14 legal definition of intent. (Dkt. No. 24, Findings of Fact, Conclusions of Law & Order on Remand at
15 2.) The record amply supports this conclusion and petitioner offers no evidence to the contrary.
16 Accordingly, petitioner's federal habeas petition should be denied with respect to his third ground
17 for relief.

19 Ground Four: Exclusion of Minorities from Jury

20 Petitioner asserts in his fourth ground for relief that minorities are systematically excluded
21 from juries in Snohomish County and in the City of Everett. The Snohomish County Superior Court,
22 on appeal, found that the record "lacks any factual basis for a finding that minorities were
23 systematically excluded from Appellant's jury." (Dkt. No. 24, Findings of Fact, Conclusions of Law
24 & Order on Remand at 1.) The court then concluded that "[t]he method by which jurors were
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1 selected did not constitute a purposeful racial discrimination by the prosecutor or the County.” ((Dkt.
2 No. 24, Findings of Fact, Conclusions of Law & Order on Remand at 2.)

3 In these proceedings, petitioner offers two documents which he believes support his claim
4 regarding the systematic exclusion of jurors. The first documents offered by petitioner is an
5 unpublished opinion of the Washington Court of Appeals in which the appellant challenged a
6 Snohomish County Superior Court decision denying his motion to withdraw his guilty plea. *State of*
7 *Washington v. Thomas*, 123 Wn.App. 1036, 2004 WL 2211696 (Wn.App. Div 1). In *Thomas*, the
8 defendant apparently testified at a hearing before the Superior Court on his motion to withdraw his
9 guilty plea that his attorney had left him with the impression that he could not get justice in his
10 Snohomish County Superior Court criminal proceedings because he was African-American while the
11 victim, the prosecutor, the judge, and the jury would white. *Id.* The defendant’s attorney testified
12 that he did tell his client there were not likely to be any African-Americans on the jury, but he denied
13 discussing the race of the prosecutor and judge, and he denied telling his client that he had no chance
14 because he was African-American. *Id.*

17 The second document offered by petitioner in support of his claim regarding the systematic
18 exclusion of jurors in Snohomish County is an article by King County Superior Court Judge Deborah
19 Fleck, which was apparently written for the Washington State Bar Association Bar News, in which
20 she discusses the Superior Court Judges’ Association Race and Justice Initiative. The initiative, as
21 described by Judge Fleck, “is to help correct the racial disproportionality that exists in the application
22 of Washington’s drug laws.” (*See* Dkt. No. 25, Ex. 2 at 6.)

24 Neither of these documents supports petitioner’s assertion that minorities are systematically
25 excluded from juries in Snohomish County or the City of Everett. And, in fact, the record is devoid
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1 of any evidence supporting such an assertion. As petitioner offers no evidence to refute the findings
2 and conclusions of the Superior Court with respect to the issue of exclusion of minorities from
3 Snohomish County juries, petitioner's federal habeas petition should be denied with respect to his
4 fourth ground for relief.

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6 Ground Six: Fair Trial

7 Finally, petitioner asserts that the trial court failed in its duty to ensure petitioner a fair trial.
8 Petitioner maintains that the trial court had an obligation to ensure that the jury was not biased against
9 black men who marry white women. This claim essentially implicates the jury selection process.
10 While the trial court undeniably has a role in that process, the United States Supreme Court made
11 clear in *Turner* that the decision of whether to question prospective jurors on the issue of racial bias is
12 a decision for defense counsel. *Turner*, 476 U.S. at 37 n. 10. Petitioner cannot assign responsibility
13 to the trial court for decisions which were within the purview of defense counsel. Accordingly,
14 petitioner's federal habeas petition should be denied with respect to petitioner's sixth ground for
15 relief.
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17 MOTION FOR PROTECTIVE ORDER

18 Petitioner has filed a renewed motion for a protective order in which he asks that the Court
19 order respondent to stay execution of his sentence.¹ Nothing in the record before this Court indicates
20 whether petitioner's state court sentence has yet been executed. Regardless, however, petitioner
21 makes no showing that he is entitled to a stay of execution of his sentence, particularly in light of this
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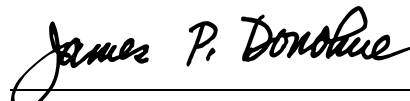
24 ¹ In his original motion for a protective order, petitioner asked this Court to issue an order
25 requiring respondent to stay his sentencing hearing pending resolution of his federal habeas
26 petition. That motion was stricken because petitioner had already been sentenced at the time the
Court considered the motion.

1 Court's conclusion that petitioner has presented no meritorious grounds for relief. Accordingly,
2 petitioner's renewed motion for a protective order should be denied.

3 CONCLUSION

4 For the reasons set forth above, this Court recommends that petitioner's federal habeas
5 petition and his renewed motion for a protective order be denied. This Court further recommends
6 that this action be dismissed with prejudice. A proposed order accompanies this Report and
7 Recommendation.
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9 DATED this 6th day of April, 2007.

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11 JAMES P. DONOHUE
12 United States Magistrate Judge
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